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In the Supreme Court of the United States

OCTOBER TERM, 1967

NO. 1020

DWAIN LEE LITTLE, also known as Dwain Lee Hardin,

Petitioner,

v.

STATE OF OREGON,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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STATEMENT OF THE CASE

On November 2, 1964, Orla Fay Fipps was brutally raped and slain. During the following routine investigation, law enforcement officials took samples of bodily substances from area residents, including the petitioner. These items became the subject of a pre-trial motion to suppress. The trial court ruled that the evidence was taken with the consent of the petitioner. The petitioner was convicted of murder in the first degree. The Oregon Supreme Court affirmed the judgment.

ARGUMENT

This Court should not grant a writ of certiorari for review of the decision of the Oregon Supreme Court (reported at 88 OAS 205, 431 P2d 810 (1967) and contained in Petition for Writ of Certiorari to Supreme Court of Oregon marked Appendix B) for the following reasons:

I

The first Question Presented by petitioner is a question of evidence and not a federal constitutional question. The petitioner asks this Court to determine whether there was sufficient evidence of consent in the record for the court to properly determine that Fourth Amendment standards were met. The trial court so found and the Oregon Supreme Court found that there was "ample evidence to support its findings". The petitioner was not a prime suspect at the time of the seizure, the petitioner's mother consented, the petitioner pulled up his sleeve and a doctor withdrew the blood sample and cut the head and pubic hair sample. Later a saliva sample was taken. All this was done in a "congenial atmosphere". The petitioner's attorney approved of the taking of the blood and saliva. All this is an evidentiary question for the state court and should not be reviewed by this Court.

In *Stoner v. California*, 376 US 483, 84 S Ct 889 (1964), this Court recognizes that consent may be proferred by act as well as speech:

> "It was a right [constitutional right against unreasonable search], therefore, which only the peti-

> tioner could waive by word *or deed*, either directly or through an agent." (Emphasis added).

This case is peculiarly exemplary of the comment of Mr. Justice Harlan in his dissent in *Fahy v. State of Connecticut*, 375 US 95, 84 S Ct 229 (1963);

> "Evidentiary questions of this sort are not a proper part of this Court's business, particularly in cases coming here from state courts over which this Court possesses no supervisory power."

Whether in a particular case an apparent consent was in fact voluntarily given or was in submission to an express or implied assertion of authority, is a question of fact to be determined in the light of all the circumstances. *People v. Burke*, 47 Cal 2d 45, 301 P2d 241 (1956).

II

The second Question Presented asks the Court to make new law by requiring warnings similar to *Miranda* warnings (*Miranda v. Arizona*, 384 US 436 (1966)) as a prerequisite to a valid consent to search of person.

This matter should not be considered by this Court in this case for the reason that the search in question occurred prior to the date of the *Miranda* opinion. In *Johnson v. New Jersey*, 384 US 719, 86 S Ct 1772, 16 Cal 2d 882 (1966), this Court has held that retroactivity should not be afforded the *Miranda* rule.

Also, the petitioner was not a focal suspect and not in police custody at the time of the search and in fact consulted with his attorney prior to his consent.

CONCLUSION

This Court should deny the Petition for Writ of Certiorari to Supreme Court of Oregon on file herein.

Respectfully submitted,

JOHN B. LEAHY, District Attorney
for Lane County, Oregon

February 7, 1968